



# I Couldn't See it Until I Believed it

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## “I COULDN’T SEE IT UNTIL I BELIEVED IT”

### Some Notes on Motivated Reasoning in Constitutional Adjudication

*Mark Tushnet\**

#### I. INTRODUCTION

It is commonplace, though controversial, in the philosophy of science to note that all observation is theory-laden.<sup>1</sup> You can’t see something until you believe it — that is, until you have some background account — a theory — about how to understand the messages your neurons are sending to and in your brain. If in science with its commitment to intersubjective objectivity, surely even more so in the normatively freighted field of law in a morally pluralistic society.

This Comment suggests that Professor Dan Kahan’s provocative Foreword<sup>2</sup> might benefit from reflection on the commitment to science it exhibits. Motivated reasoning may be at work in the Foreword as well — not reasoning from cultural premises to legal conclusions, but reasoning from a background theory of science as a good explanans for law in general to conclusions about the structure of legal reasoning as displayed in Supreme Court opinions. A related form of reflection suggests that Kahan’s route out of the problems he diagnoses might be unavailable in practice. To put it somewhat more sharply than I will as I develop the argument, his target audience — the Justices of the Supreme Court — might see his proposal for a new style of opinion-writing as itself motivated by cultural predispositions, packaged as science for merely strategic reasons. One response might be to shift the target audience from today’s Justices to tomorrow’s, to those who will be selected over the next decades. Then, though, we would need some institutional and political account of how the selection processes, by Presidents and Senates, that have produced the Justices we now have, might be changed to produce the kind of Justice who would find Kahan’s prescriptions appealing — and so produce a different kind of Justice.

I think there is a rather deep tension between the form and substance of Kahan’s argument. In form it presents itself as an argument

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<sup>1</sup> The standard citation is NORWOOD RUSSELL HANSON, *PATTERNS OF DISCOVERY* (1958).

<sup>2</sup> Dan M. Kahan, *The Supreme Court 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011).

by a detached observer, noting how different cultural commitments affect the way each Justice assesses the cases the Court decides. Its substance is the claim that motivated reasoning is pervasive and arises from cultural commitments. The question naturally presents itself: from what position is Kahan able to stand such that he is a detached observer?

The light cast by the intellectual history of U.S. legal scholarship suggests an answer. Kahan writes in the Progressive branch of the legal realist tradition. That branch accepted Progressivism's deep commitment to science and technical expertise to address — and solve — society's problems.<sup>3</sup> Kahan's argument is legal realist in its invocation of social-scientific knowledge as the basis for understanding what courts do in fact, to use Holmes's phrase.<sup>4</sup> And, it is Progressive in its belief that social-scientific knowledge will provide guidance for the resolution of normative difficulties, here, normative difficulties associated with the way in which Justices write opinions. But, of course, Progressivism was more than an intellectual program. It had political commitments as well, to roughly liberal solutions to normative issues of public policy.

In this light Kahan's is a partisan intervention not different in kind from the opinions he discusses. Though I am not nearly as deeply immersed in the scholarship on cultural cognition as Kahan, it is clear to me that the commitment to social-scientific knowledge the Foreword exhibits is itself one component of one of the cultural complexes that scholarship has identified.<sup>5</sup> As Kahan observes, those with a hierarchical and individualistic culture seem to tend to be climate-change skeptics,<sup>6</sup> and I suspect are skeptical about purportedly scientific claims more generally. If so, I think it quite unlikely that hierarchical individualists would be shaken from their views by Kahan's social-scientific claims. Again, to put it a bit more sharply than is justified, we are quite unlikely to observe anything more than superficial invocations of science by judicial conservatives. Put another way, the stance of detached scientific observer is one taken by a partisan — as indeed Kahan's analytic framework requires.

Seen in that way, Kahan's Foreword offers just one of many possible ways of thinking about the Court — within his framework, a social-scientific way associated with a particular cultural world view. I

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<sup>3</sup> The Progressives offered policy proposals that are mostly recognizable today as generally liberal (though their enthusiasm for eugenics is not), but, as modern scholarship in law and economics suggests, there was no intrinsic political valence to the deep commitments.

<sup>4</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897).

<sup>5</sup> My guess, though it is only that, is that the commitment is a component of the egalitarian/communitarian cultural world view.

<sup>6</sup> Kahan, *supra* note 2, at 25.

note that we need not take his framework as the only one available. Again, attention to the history of U.S. legal thought suggests a number of possible responses to the social-scientific turn: pure normativity or skepticism all the way down, for example.

## II. CHANGING THE COURT'S STYLE

I turn now to a more particularized discussion consistent with these relatively general observations about Kahan's enterprise. Kahan suggests that a different style of opinion writing might alleviate some of the difficulties associated with motivated reasoning. Opinions should acknowledge openly that there are competing perspectives that would lead to different results, and that those perspectives, while rejected by the majority, have the same kind of integrity the majority's opinion does.<sup>7</sup> As an example, Kahan uses the majority's concession in *District of Columbia v. Heller*<sup>8</sup> that the recognition of an individual right to bear arms does not threaten many long-standing regulations of gun possession and use.<sup>9</sup> The example is more complex than Kahan indicates.

As is well-known, the main line of analysis in *Heller* was thoroughly originalist. Seeking to determine the original public meaning of the Second Amendment's words, Justice Scalia looked at contemporaneous discussions of those words and concluded that a reasonable and reasonably well-informed person of the 1790s reading those words would conclude that they guaranteed an individual right. Justice Stevens mined the same sources and concluded that such a person would conclude that they guaranteed only a right related to membership in an organized militia. Strikingly, both opinions are written in a tone of certainty about what the historical record reveals, and indeed a reader could reasonably conclude that Justices Scalia and Stevens each presented the other as incompetent in reading the sources, or — as Kahan would say — as motivated to read the sources as they did because of their cultural predispositions.

Suppose, though, that the sources really are divided. Having done my own review,<sup>10</sup> I think that the evidence is something like a sixty

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<sup>7</sup> This suggestion is part of a family of ideas including Professor Robert Burt's proposal that *decisions* as well as opinions award something to both sides, ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992), and Professor Cass Sunstein's minimalism in outcome, CASS R. SUNSTEIN, *ONE CASE AT A TIME* (1999).

<sup>8</sup> 128 S. Ct. 2783 (2008).

<sup>9</sup> *Id.* at 2816–17.

<sup>10</sup> See generally MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS* (2007).

percent to forty percent preponderance for the individual-right view.<sup>11</sup> Neither opinion in *Heller* is written in a way that acknowledges this possibility.<sup>12</sup> Rather, both opinions follow advice attributed to Justice Louis Brandeis: “[T]he difficulty with this place is that if you’re only fifty-five percent convinced of a proposition, you have to act and vote as if you were one hundred percent convinced.”<sup>13</sup> This is a prescription for the kind of cultural conflict Kahan seeks to transcend, a prescription filled in *Heller*’s core analysis.

So, one part of *Heller* reinscribes cultural conflict. Does the savings paragraph open up a different possibility? Not necessarily. Much depends on *how* the Court proposes to defend the wide range of existing regulations it says it is not questioning. Kahan might be right if the Court were to say that a regulation could be justified by showing that the public-safety benefits it provides outweigh the restrictions it places on the individual right to keep weapons for self-protection. Yet, the textual evidence in *Heller* points away from this sort of functional inquiry. Justice Scalia’s opinion indicates, though it does not quite say in detail, that the relevant inquiry is going to be whether a particular regulation is sufficiently similar to long-standing regulations, especially of course those in place when the Second Amendment (or the Fourteenth Amendment, for state-adopted regulations) was ratified, to fall within a historically defined category of regulations outside the Amendment’s scope.<sup>14</sup> *That* inquiry, though, may well yield the same “sixty-forty” results about the evidence and the same “one hundred percent” results in opinion writing.

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<sup>11</sup> To the extent that this can be put in original public meaning terms, the thought is something like this: if someone had done a survey in 1791 about the Second Amendment’s meaning, sixty percent of the respondents would have said that it guaranteed an individual right, forty percent that it protected a militia-related right.

<sup>12</sup> My view is that original-public-meaning theorists have not yet adequately explained what to do where the evidence is equivocal in some sense. Among the candidate solutions are (1) to treat the provisions at issue as outside the scope of original-public-meaning analysis, so that their meaning is to be constructed rather than interpreted, to use Professor Keith Whittington’s term; (2) to treat the view with more support as “the” original public meaning; or (3) to adopt the interpretation that leaves the widest scope for action by democratically responsible decision-makers (the “judicial restraint” approach). The second solution might work where there are only two competing candidate interpretations, but once there are more than two the possibility arises that the Court would enforce, against legislatures, a meaning rejected by a majority of those alive when the constitutional provision was adopted.

<sup>13</sup> Cited in Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1188 n.235 (2010). Professor Snyder quotes other versions of Brandeis’s statement, not all of which necessarily refer to opinion writing.

<sup>14</sup> For similar historically oriented analyses of the Constitution’s coverage, see *United States v. Stevens*, 130 S. Ct. 1577, 1584–86 (2010), and *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2734–37 (2011).

### III. CHANGING THE JUSTICES

Justice Brandeis referred to an institutional culture of “this place.” Presumably, then, Kahan hopes for a change in *that* culture. Yet, it is unclear to me how the change is to come about. On his account, the Justices in place already have the cultural predispositions that motivate their reasoning.<sup>15</sup> Perhaps merely talking to them about the phenomenon will lead them to reflect on and then change their practice. But, they will hear Kahan’s advice about opinion writing through the filters of their cultural predispositions. And, as he emphasizes, one effect of motivated reasoning is suspicion of those who reach different conclusions. So, I would think, the Justices would treat Kahan’s suggestions as themselves motivated by cultural predispositions they — or at least some of them — do not share.

Another possibility is that a Justice might take a small step in offering a Kahan-like opinion that leaves things open and that, through its rhetoric, exhibits a seemingly genuine openness to the possibility that the other side might have something to be said for it. Another Justice might then reciprocate, and the small steps might accumulate and eventually transform the culture of “this place.”<sup>16</sup> Nothing is impossible, of course, but I must note my skepticism about the proposition that the Justices currently on the Court will find it worthwhile to engage in this behavior.

One way out of this difficulty is to change the Justices — not to change the minds of those already in the position, but to change the kind of person who is chosen as a Justice.<sup>17</sup> As those who accept

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<sup>15</sup> It is barely conceivable that the legal culture generally, and through it the Justices in place, would come to accept Kahan’s account of cultural cognition and its effects on the law. I do not fault Kahan for trying to push that kind of change forward, but I think that his own account should induce some skepticism about the effort’s likely success.

<sup>16</sup> That the Court consists of only nine people might make modeling and the ensuing emulation more effective than it would be in a larger institution. I note though that the Justices have staffs that, no matter what the formalities of authority within the chambers, might place some limits on how far any individual Justice could depart from the culture-in-place.

<sup>17</sup> I believe that some of the difficulties Kahan describes arise from two related changes in our selection processes. The first, widely noted, is the development of an apparent norm that nominees for the Supreme Court must have non-trivial amounts of experience as appellate lawyers, preferably as judges but if not, certainly as specialists in Supreme Court litigation. That norm seems to have displaced an earlier norm in which significant experience in high-level positions in national politics was an alternative qualification. The usual way of making the point is to compare the pre-Court positions held by the members of the Court that decided *Brown v. Board of Education* with the pre-Court positions held by today’s Justices. Cf. MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* 104 (2010). The second change is that our national political system has changed rather dramatically, from one in which our national political parties were ideologically diverse coalitions held together by a variety of forms of interest-group bargaining into one in which the parties are quite ideologically coherent and sharply polarized. Today, experience in high-level national politics might not produce the kind of Justices who would behave in an interestingly different way from the Justices we now have.

Kahan's diagnosis and prescription come to staff the Supreme Court, the Court's institutional culture will change. Formally, this is well and good, but of course it says nothing about how the change in the selection process will come about. Presidents nominate Justices, and the Senate confirms or rejects those nominations, for political reasons. To change the selections we would need to change the politics. I am all in favor of doing so, but at present I do not see even glimmerings of the kind of transformation we would need.<sup>18</sup>

#### IV. CONCLUSION

In the end I return to Kahan's attraction to a science-based analysis of the Supreme Court. As I have suggested, I hear in his work the sounds of an earlier era, the era when Progressives believed that scientific expertise could be called upon to resolve normative questions that divided the nation. Committed to the idea that there was a public interest that transcended the interests of any group within society, the Progressives succeeded for a while, and a revived "progressivism" of science and expertise might succeed as well. But Progressivism collapsed some time in the middle of the last century. It did so partly for political reasons: its successes generated a new kind of pluralist, interest-group politics in which the beneficiaries of Progressive innovations used politics to defend their turf. In one sense Kahan's analysis of cultural cognition attempts to retrieve the ground of science by taking pluralist politics into account. But, Progressivism in law collapsed for intellectual reasons as well: the Progressive view of science was imperialist and utopian. Technical specialists would replace political decisionmakers across the entire range of public policy, from ratemaking in economic regulation to rehabilitation in the criminal justice system and beyond. The specialists were discredited when they failed to pay off on their largest claims.<sup>19</sup> I wonder whether Kahan's position might also be vulnerable to the latter objection.

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<sup>18</sup> Perhaps Kahan envisions a gradual change in professional culture, encouraged by the publication of articles like his and by classroom performances of a particular sort, that would eventually lead lawyers generally — and through them Presidents and Senators — to think that opinion writing in the currently favored style is not acceptable as a matter of professional craft. Given my age, my time-horizon might be too short, but I can only report my reaction: "Not in my lifetime — and probably not in his." But, as far as I am concerned, go for it.

<sup>19</sup> For an introduction to my views on these issues, see Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565 (2011).